Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-408

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR., TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 551 F.2d 61. The opinion of the Benefits Review Board (BRB) is reported at 3 BRB 310. The opinion of the Administrative Law Judge (ALJ) is reported as Case No. 75-LHCA-129. The opinion of the United States Court of Appeals for the Fifth Circuit is annexed as Appendix "A"; the opinion of the Benefits Review Board is annexed as Appendix "B"; the opinion of the Administrative Law Judge is annexed as Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 20th day of April, 1977. (Appendix D) Rehearing was not sought in that court. An order was signed by Justice Powell extending to September 17th, 1977 the time for Petitioner to file a Petition for Writ of Certiorari. The jurisdiction of this court is invoked under 28 USC, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal constitutional question involved is Article III, Section II, Paragraph 1 "the Judicial Power shall extend to . . . all cases of admiralty and maritime jurisdiction . . ." The federal statute involved is the Longshoremen and Harbor Workers' Compensation Act, 33 USC 901 et seq., the pertinent portion of which is appended hereto as Appendix "E".

QUESTIONS PRESENTED FOR REVIEW

Morgan was killed while moving a plate of steel in the fabrication shop located in Petitioner's shipyard at Pascagoula, Mississippi. His employment was non-maritime, in that he never went aboard a vessel on or near the navigable waters of the United States, and was totally a shore-based welder who would not otherwise be covered by the Act for part of his activity.

While much of what was said by this court in *Caputo* and *Blundo*[1] (hereinafter *Caputo*) is applicable to the shipbuilding industry, certiorari should be granted in this case to permit Petitioner to demonstrate on the merits that:

I. Congress did not extend the LHWCA to employees of a shipbuilder who were shore-based, non-maritime and would not otherwise be covered by the Act for part of their activities.

II. The "ongoing shipbuilding" test adopted by the Fifth Circuit Court of Appeals in *Halter Marine*[2] as applied to this case ignores the ". . . clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee . . ."[3] which is apparent from the congressional hearings. There is a conflict in the case sub judice, with settled principles of admiralty

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1 *Northeast Marine Terminal v. Ralph Caputo, ITO v. Blundo*, 45 LW 4729, 97 S.Ct. 2348, 53 L.ed.2d ____.
2 *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th, 1976)
3 *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th, 1975)

and maritime law adopted by this court and the decision of the United States Court of Appeals for the Ninth Circuit in *Weyerhauser*.

III. If the Fifth Circuit Court of Appeals has correctly divined[4] the intent of Congress to include land-based, non-maritime employees of a shipyard who would not otherwise be covered by the Act for part of their activity, then Congress exceeded its authority under Article III, Section II, P.1 of the Constitution.

STATEMENT OF THE CASE

While acting within the scope of his employment, Morgan was fatally injured at a shipyard in Pascagoula, Mississippi, which was owned and operated by Petitioner. A claim was filed with the U.S. Department of Labor, Bureau of Employee's Compensation, by Morgan's widow and dependents for death benefits under the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C.A., Section 901 et seq. (LHWCA). The claim was controverted by Petitioner on the basis that Morgan was covered by the Mississippi Workmens' Compensation Act rather than the LHWCA. The case was submitted entirely on an agreed stipulation and attached exhibits.

According to the stipulation and exhibits Morgan, on February 26, 1973, was hired by Ingalls as a shipfitter-helper-apprentice (AP 225). On February 27, 1973 Morgan was assigned to the training department

4 The total absence of any discussion in the congressional hearings concerning the shipbuilding industry leads to the conclusion that the Fifth Circuit perceived the impact of the amendments on shipbuilding by intuition, insight, or divination.

where he was given basic training which consisted of tack welding, hand torch burning, platen training, blueprint reading, basic mathematics, triangulation and layout, and welding familiarization. He was also given an academic course in shipbuilding terminology and a package of training rules and regulations (AP 225). On March 12, 1973 Morgan was assigned to the fabrication shop as a shipfitter-helper-apprentice. Morgan's duties at the fabrication shop were to work under Supervisors Smith and Havard to layout, cut, shape and tack steel parts which were made in the fabrication shop (AP 225).

As a shipfitter-helper-apprentice, Morgan was to learn the use of the various machinery located inside the fabrication shop and to cut, shape, and tack steel parts (AP 225). After the training program Morgan was assigned to Department 6, the unit administering shipfitters assigned to the fabrication shop. Department 6 consists solely of shipfitters and other crafts assigned to the fabrication shop and whose normal duties are confined to such shop (AP 226). Neither Supervisor had the authority to assign Morgan to a job near or over water. Morgan's duties were confined to the interior of the fabrication shop and there is no record in Morgan's file that he was ever assigned outside the fabrication shop (AP 225).

In March 1973 there were two departments at Ingalls for the shipfitter classification. Shipfitters who work in the fabrication shop were assigned to Department 6. Shipfitters who worked on launched ships or in the modular assembly area were assigned to Department 7 (AP 226). No change in Morgan's duties or department could be made without the transfer of the Ingalls shipyard. The transfer could only be made upon re-

quest of the employee and upon approval by Anderson, General Superintendent of Fabrication, the Director of the department involved, and the Labor Relations Department at Ingalls, West Bank. If a transfer is approved, the employee's departmental records are transferred to the new department and the employee is given a new job designation or description depending on the type of work being done in the new position (AP 226).

The various parts that are fabricated at the fabrication shop are removed therefrom by the Transportation Department and taken to another place on the Ingalls premises for storage or additional work (AP 224).

Additional work may include cleaning, buffing, blasting or painting. After completion of the work the majority of pieces are stored on Ingalls premises until needed. The steel pieces from the storage area are later moved by the Transportation Department to the subassembly area where they are incorporated into larger units. These larger units are later moved to the modular assembly area where modules are constructed. The modules are then moved to the integration area where they are fitted together (AP 224). All the work performed on the pieces after they have left the fabrication shop is done by employees from other departments (AP 226). The material flow and construction process is shown in Exhibit "L" (AP 238).

The fabrication shop is used for cutting, shaping, tacking, and welding steel parts which are used in the construction of ships and other seagoing vessels (AP 223). Ingalls, West Bank, is engaged only in the construction of new ships and does no repair work.

Morgan was an entirely land based employee who had never been aboard a launched vessel at Ingalls and who had never been assigned duties at or over water and whose regular duties never required that he go upon a vessel that was launched or situated upon navigable waters.

The fabrication shop is located 910 yards from the Gulf on the south and 481 yards from the Pascagoula River on the east as shown in Exhibits "H" and "K" (SUPP. AP 1, 26).

Morgan was killed in Bay No. 2 of the fabrication shop at Ingalls West Bank when a large steel plate fell upon him (AP 222).

ARGUMENT

I. Congress Did Not Extend The LHWCA To Employees Of A Shipbuilder Who Were Shore-Based, Non-Maritime And Would Not Otherwise Be Covered By The Act For Part Of Their Activities.

Petitioner controverted the claim filed by the widow and dependents of Morgan with the U.S. Department of Labor, Bureau of Employee's Compensation for benefits under the LHWCA, contending that the claim fell within the Mississippi Workmen's Compensation Act rather than the LHWCA. The ALJ awarded benefits; the BRB and Fifth Circuit Court of Appeals affirmed the award.

The Petitioner is aware of the remand of *Perdue*[5] for reconsideration by the Fifth Circuit in the light of *Caputo*, and that the court denied certiorari in *Halter*[6] and *Dravo*.[7] The court has yet to grant certiorari in a case involving the impact of the 1972 amendments to the LHWCA on the vast shipbuilding industry.

Morgan's injury would not have been covered under the pre-1972 LHWCA. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). The adoption of the amendments to establish ". . . a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity",[8] was motivated out of a ". . . desire to provide continuous coverage throughout their employment to those *amphibious workers* who, without the amendments, would be covered only for part of their activity."[9] (emphasis added)

Morgan was not an amphibious worker. He was a land-based, non-maritime employee working in the fabrication shop of Litton. The thorough analysis by the unanimous court in *Caputo* of the legislative history of the amended Act, the congressional and judicial history of the prior act, and the applicable principles of law, indicate that with respect to shipbuilding, a non-maritime, shore-based employee, no part of whose activity would have been covered by the prior Act is clearly not engaged in ". . . maritime

5 *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976) Perdue was a ship repairman.
6 *Halter Marine Fabricators, Inc. v. Nulty*, No. 76-880, cert. denied, 97 S.Ct. 2973, 53 L.ed.2d ____.
7 *Dravo Corp. v. Maxin*, No. 76-1093, 97 S.Ct. 2973, 53 L.ed.2d ____.
8 *Caputo*, supra, 45 LW 4735, 97 S.Ct. 2348, 53 L.ed.2d ____.
9 *Caputo*, supra, 45 LW 4735, 97 S.Ct. 2348, 53 L.ed.2d ____.

employment". However, as the court observed, the question of what is meant by "maritime employment" ". . . is made difficult by the failure of Congress to define the relevant terms . . ."[10] In *Caputo* the court declined to look beyond sub-categories of longshoremen and persons engaged in the longshoring operations,[11] and declined to pass on the Director's view that "Maritime employment include(s) all physical tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation." (*Caputo*, at 45 LW 4735) It is now important for the court to fashion a definition of "maritime employment" applicable to the shipbuilding industry. The congressional reports will be of little help. The original versions of the Senate and House bills did not contain the definition of the terms "employee" or "navigable water" as they later appeared in the final version of the Act, nor did the term "shipbuilder" appear until the final version of the amendments was reported by the Senate Committee on Labor and Public Welfare.[12]

In its final response to the *Nacirema*[13] invitation, Congress gave the longshoremen greater benefits, limited his right to recover against the shipowner, and gave his employer, the stevedore, assurance that its liability for the substantial increase of benefits would be exclusive and would not be increased, and abolished the *Sieracki-Ryan* circle of liability.

But that is not all Congress did. In an almost casual, offhand way, the vast industry of shipbuilding was

10 *Caputo*, supra, 45 LW 4733, 97 S.Ct. 2348, 53 L.ed.2d ____.
11 *Caputo*, supra, Footnote 25.
12 S. Rep No. 92-1125, 92d Cong., 2d Sess, p. 24
13 *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969)

brought into the scope of the LHWCA, to an extent not specified by Congress. Uncounted hours of effort on the part of groups having their own special interest in the shipping, longshoremen and stevedoring industries are represented in the committee reports.[14] But Congress did not seek, nor did it have before it, information from which it could determine the number of accidents occurring in shipyards or the cost impact on the shipbuilding industry.

To fashion a definition of "maritime employment" applicable to the shipbuilding industry, petitioner contends that this court must look to its precedents in the admiralty and maritime field and must "proceed with caution . . ."[15] We believe that the observation of the Ninth Circuit Court of Appeals[16] that the amendments contained a ". . . clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee", is the proper major premise on which to build that definition. A non-amphibious, shore-based, non-maritime employee, no part of whose activity was previously covered, has no realistic relationship to admiralty.

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14 "The main concern of the amendments was not with the scope of coverage but with accommodating the desires of three interested groups . . . shipowners . . . employees of longshoremen & . . . workers" *Caputo*, 45 LW 4732, 97 S.Ct. 2348, 53 L.ed.2d ____. The shipbuilding industry was not a party to nor did it benefit by the compromises.

15 *Victory Carriers, Inc. v. Law*, 404 U.S. 212

16 *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975)

II. The "Ongoing Shipbuilding" Test Adopted By The Fifth Circuit Court Of Appeals In *Halter Marine* As Applied To This Case Ignores The ". . . Clearly Expressed Congressional Perpetuation Of The Essential Element Of Admiralty Jurisdiction Over The Employee . . ." Which Is Apparent From The Congressional Hearings. There Is A Conflict In The Case Sub Judice, With Settled Principles Of Admiralty And Maritime Law Adopted By This Court And The Decision Of The United States Court Of Appeals For The Ninth Circuit In *Weyerhauser*.

While Morgan was not an amphibious employee, he was working on a sheet of steel ultimately destined to become part of a vessel which had yet to be constructed. The Fifth Circuit Court of Appeals, applied its ". . . ongoing shipbuilding . . ." test formulated in *Halter*[17] to Morgan, holding that he was covered. Nulty, the injured claimant in *Halter*, met the amphibious employee test; he would go aboard an existing vessel from time to time, although most of his work was ashore. Prior to the amendments Nulty's shoreside accident would have been covered by State Workmen's Compensation Laws and not by the LHWCA. The adoption, in the '72 amendments to the Act, of a ". . . uniform compensation system to apply to employees who would otherwise be covered by this Act for part of (his) activity", clearly extended coverage to that amphibious employee.

The extension of coverage in this case to a non-maritime employee is contrary to the interpretation of

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17 *Halter Marine Fabricators v. Nulty*, No. 76-880, cert. denied 97 S.Ct. 2973, 53 L.ed.2d ____.

the Act by the Ninth Circuit Court of Appeals. That Circuit felt that for the injury to be compensable there must be a traditional maritime nexus with the injury.

The court said:

> We hold that for an injured employee to be eligible for federal compensation under LHCA (sic), his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistic significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters, with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Sect. 903. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972)." (and other authority)

While the Fifth Circuit may have been justified in concluding that Nulty was an Amphibious employee,[18] there was no basis to conclude that Morgan was such an employee, unless the Fifth Circuit looked to the status of the employer rather than the non-maritime status of the employee. *Weyerhauser* rejected the suggestion that "maritime employment" means "any employment", and did so by requiring that the ". . . employment must have a realistic relationship to the traditional work and duties of a ship's service employment."[19]

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18 *Halter Marine Fabricators*, supra, 543.

19 *Weyerhauser*, supra, at p. 961.

The Fifth Circuit's "ongoing shipbuilding test" looks to the status of the employer, which, in this case, is clearly that of a "shipbuilder", within the meaning of the Act. Having established that status of the employer, it then reasons that even a non-amphibious, non-maritime shore based employee is covered by the Act, because his employer is engaged in shipbuilding. We submit that the better test is found in *Weyerhauser*, and the petition should be granted to resolve this conflict in the circuits.[20]

If, as we have argued, the amendments did not include a non-maritime, non-amphibious, shore based employee, then the amendments as they relate to shipbuilding are consistent not only with the primary purposes underlying the amendments, but with the committee reports and traditional maritime concepts. The results we have suggested, moreover, would avoid ". . . harsh and incongruous results . . .", accommodate "the expansive view of the extended coverage"[21], would not create an overlapping of federal-state jurisdiction, and would not "revitalize the shifting and fortuitous coverage that Congress intended to eliminate."[22] The error in the Fifth Circuit's ongoing shipbuilding test lies with its rational divination of the intent of Congress.

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20 *Weyerhauser* involved the extension of coverage of the Act to a subcategory of employees not formerly covered unless the injury occurred on navigable waters and his employer had ". . . an employee (not necessarily the injured employee) engaged in maritime employment . . ." P. 960. Morgan would not have been covered under the pre-1972 Act, unless he had been injured aboard a vessel in navigable waters. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

21 *Caputo*, 45 LW 4734, 97 S.Ct. 2348, 53 L.ed.2d ____.

22 *Caputo*, 45 LW 4736, 97 S.Ct. 2348, 53 L.ed.2d ____.

III. If The Fifth Circuit Court Of Appeals Has Correctly Divined The Intent Of Congress To Include Landbased, Non-Maritime Employees Of A Shipyard Who Would Not Otherwise Be Covered By The Act For Part Of Their Activity, Then Congress Exceeded Its Authority Under Article III, Section II, P.1 Of The Constitution.

Petitioner's suggestion in the Fifth Circuit that that court's interpretation of the Act distorted the contours of admiralty jurisdiction by a disquieting bulge to the extent that the Act was unconstitutional, was answered by that court by reference to Part IV of *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 544-546.

The court rejected the Halter attack on the constitutionality of the Act because of "... Congress' broad powers to expand the reach of admiralty jurisdiction."

While the court may have been correct in applying that approach to Halter's amphibious employee, we argued there, and desire to develop fully here, that while the inclusion by Congress in a casual, almost haphazard way, of the shipbuilding industry[23] in the Act may have been appropriate for amphibious maritime employees, the requirement that the injured worker be "engaged in maritime employment" (without defining that term) meant that the courts must look to traditional maritime concepts as the

23 An industry never before considered maritime, *Thames Tow Boat Co. v. The Schooner McDonald,* 254 U.S. 242 (1920); *Tucker v. Alexandroff,* 183 U.S. 424 (1902)

Ninth Circuit did in *Weyerhauser* and as this court did in its unanimous decision in *Executive Jet Aviation v. Cleveland.*[24]

A shore based, non-maritime employee of a non-maritime industry has no more nexus to a "... traditional maritime activity,"[25] than the plane crash in *Executive Jet* and to the extent Congress sought to include him within the LHWCA it did not scrupulously confine its jurisdiction to "... traditional maritime activity involving navigation and commerce on navigable waters."

We are not suggesting that this court adhere to those principles out of some blind allegiance to hoary dicta. On three occasions[26] this court has recognized that:

> ... Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.

We think that it is beyond question that when congress required that the injured employee be "engaged in maritime" employment without defining that term, it recognized that there were limitations to its ability to move the Jensen line shoreward. Just as this court suggested in *Nacirema* that the invitation to move the Jensen line shoreward should be addressed to congress; the congress has invited the courts to define

24 409 U.S. 249 (1972)
25 *Executive Jet Aviation,* at p. 261
26 *Healy v. Ratta,* 292 U.S. 263, *Victory Carriers, Inc. v. Law,* 404 U.S. at 212, and *Executive Jet,* at 273.

"engaged in maritime employment". We suggest that as the act applies to the shipbuilding industry — one entirely different from the longshoremen, ship repair ship breaking or harbor worker industries[27] — the Ninth Circuit and *Executive Jet* approach give ". . . due regard for the rightful independence of state governments . . .", provide a proper adherence to settled principles of maritime law, and should be followed.

CONCLUSION

For the reasons assigned, Petitioner suggests that a petition for writ of certiorari should issue to the United States Fifth Circuit Court of Appeals for consideration of all questions, including subsidiary questions herein briefed.

Respectfully submitted,

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27 The Fifth Circuit in *Halter* rejected the contention that in extending coverage to the shipbuilding industry, congress had to ". . . find a 'contract' or 'tort' peg upon which to hang its legislation." (*Jacksonville Shipyards v. Perdue*, at page 545) Of all the industries covered by the amended act, the shipbuilding industry was the only one, traditionally, non-maritime in nature. We do not suggest a total immunity from the reach of the act for the shipbuilding industry, but do suggest that the rejection by the Fifth Circuit of a "contract" or "tort" peg may be wrong in the light of Mr. Justice White' comment in Footnote 7 in *Nacirema*, that the "Act combines elements of both tort and contract," and under Supreme Court Rule 23, the error may be considered "a subsidiary question . . ." to be briefed on the merits.

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Attorneys for Petitioner

CERTIFICATE

I, George E. Morse, one of counsel for the Petitioner in the above styled matter, hereby certify that I have this day mailed a true copy of the foregoing Petition for Writ of Certiorari to Mr. Bobby O'Barr, Attorney at Law, P. O. Box 541, Biloxi, Ms. 39533, and Miss Laurie M. Streeter, Associate Solicitor, United States Department of Labor, Room N-2716 NDOL, Washington, D.C. 20210.

This ____ day of September, 1977.

APPENDIX "A"

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC., Petitioner,

v.

Dorothy T. MORGAN, Ernest W. Morgan, Jr., Timothy E. Morgan, Claimants-Respondents,

Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

No. 76-1880.

United States Court of Appeals, Fifth Circuit.

April 20, 1977.

Petition for Review of an Order of the Benefits Review Board (Mississippi Case).

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

PER CURIAM:

Petitioner Ingalls Shipbuilding Corporation appeals from a decision of the Benefits Review Board, U. S. Department of Labor, affirming an award of benefits to respondents under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. Respondents' decedent, Ernest W. Morgan, worked as a ship fitter helper apprentice in a fabrication shop in the Ingalls shipyard in Pascagoula, Miss. Workers in the shop cut, shape, tack and weld steel parts later used for construction and repair of ships. Morgan died when a steel plate he was cleaning fell on him.

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* District Judge of the Southern District of Florida sitting by designation.

Ingalls questions whether, under the terms of the Act, Morgan was a covered employee, 33 U.S.C. § 902(3), working on a maritime situs, 33 U.S.C. § 903(a). If he was, Ingalls suggests the Act is unconstitutional. These issues are controlled by *Halter Marine Fabricators Inc. v. Nulty, decided with Jacksonville Shipyards Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed* 45 U.S.L.W. 3514 (Jan. 25, 1977). *Nulty* upheld an award of compensation benefits to a worker in a shipyard fabrication shop and determined the Act so applied was constitutional. Nulty was covered, the Court held, because he was "directly involved in an ongoing shipbuilding operation." 539 F.2d at 544.

Ingalls suggests three possible reasons for distinguishing the status of Morgan from the status of Nulty. First, at the time of his injury, Morgan was only cleaning, while Nulty was constructing. Because cleaning was a necessary prerequisite to the fabrication of the steel for use in shipbuilding, this distinction is immaterial. Second, Morgan was working on a steel plate for a ship that had not yet been launched, while Nulty was fabricating a piece of woodwork for a floating vessel. The work of shipbuilding, however, commences before there is a launched vessel. Third, Morgan never worked on board a ship, while Nulty did from time to time. Shipbuilders who do the initial work to construct a vessel for launching are, nonetheless, just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship.

Morgan's cleaning task was an essential step of the shipbuilding process, and it defies plain meaning of

the words "ongoing shipbuilding operation" to restrict them to activities that relate to vessels that are already floating. Ingalls argues that the "ongoing shipbuilding" test is wrong if it eliminates any requirement that the status of the injured employee be judged without regard for traditional maritime concepts. *Nulty*, however, holds that shipbuilders perform a maritime function.

AFFIRMED.

APPENDIX "B"

DOROTHY T. MORGAN (Widow)
ERNEST W. MORGAN, Jr. and
TIMOTHY E. MORGAN (Minor Children)
(ERNEST W. MORGAN, deceased)

Claimants-Respondents

versus BRB No. 75-159

INGALLS SHIPBUILDING CORPORATION
DIVISION OF LITTON SYSTEMS, INC.

Self-Insured Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION

Digest Section | Syllabus

1806 A ship fitter helper apprentice working in a shop for cutting, shaping, tacking, and welding parts which were later used in the construction and repair of vessels was then engaged in maritime employment within the meaning of Longshoremen's Act Section 2(3).

p. 312

1809 A shop used for fabrication of parts used in the construction and repair of vessels is an adjoining area on navigable waters within the meaning of Longshoremen's Act Section 3(a), since such an adjoining area is bounded only by its use as a maritime enterprise, and the shop was designed and used for ship construction and repair.

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960 Participation of the Director, Office of Workers' Compensation Programs, in the hearing of a Longshoremen's Act claim before an administrative law judge was proper, since the Secretary of Labor or his designee is authorized to appear and participate in any formal hearing held pursuant to the regulations implementing the Act on behalf of the Director, as a party in interest, and the question of the scope of jurisdiction under the Act is a substantial legal issue that affects the administration of the Act.

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Appeal from Decision and Order of Thomas F. Howder, Administrative Law Judge, United States Department of Labor.

Bobby G. O'Barr, Biloxi, Mississippi, for the claimants.

Eldon L. Bolton, Jr., (White and Morse), Gulfport, Mississippi, for the employer.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal from a Decision and Order (75-LHCA-129) of Administrative Law Judge Thomas F. Howder pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (hereinafter referred to as the Act).

On June 22, 1973, Ernest W. Morgan was fatally injured during the course of his employment at Ingalls Shipbuilding Corporation in Pascagoula, Mississippi. Morgan was employed as a ship fitter helper apprentice in the fabrication shop. The shop was used for cutting, shaping, tacking, and welding steel parts which were later used in the construction and repair of

ships and other seagoing vessels. Morgan was killed when a steel plate fell on his pelvic area.

The administrative law judge found that Morgan's death was covered by the Act and benefits were awarded accordingly.

Employer appeals contending that Morgan was not an employee under Section 2(3) of the Act, Ingalls Shipbuilding Corporation was not an employer under Section 2(4) of the Act, and the situs of the accident was not covered under Section 3(a) of the Act. 33 U.S.C. §§902(3), 902(4) and 903(a). It is also argued that the amendments to the Act if construed as extending the Act's jurisdiction to the situs of this accident are unconstitutional. Employer also objects to the participation of the Director, Office of Workers' Compensation Programs in this case.

Employer admits that deceased was an employee but asserts that deceased was not a covered employee pursuant to Section 2(3) of the Act because he was not engaged in maritime employment. This argument will not bear close examination. Section 2(3) of the Act defines "employee" to be "any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker *including a ship repairman, shipbuilder* . . . ." (emphasis added). 33 U.S.C. §902(3).

The employer is in the business of ship construction and repair. Morgan was among those employees whose work contributed to this construction and repair. On the day he was fatally injured, Morgan was

working on steel parts which were used in the actual construction and repair of vessels. The Board finds this to be an essential aspect of the employer's shipbuilding enterprise and thus maritime employment within the meaning of the Act. *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437, BRB No. 74-179 (May 2, 1975); *Skipper v. Jacksonville Shipyards, Inc.*, 1 BRBS 533, BRB No. 74-213 (June 11, 1975); *Maxin v. Dravo Corp.*, 2 BRBS 372, BRB No. 75-145 (Oct. 20, 1975); 1A BENEDICT ON ADMIRALTY §16 (7th ed. rev. 1973).

Section 2(4) of the Act defines an employer as anyone "whose employees are engaged in maritime employment." 33 U.S.C. §902(4). As it has been established that Morgan was an employee in maritime employment, it follows that Ingalls Shipbuilding Corporation was an employer under the Act.

Section 3(a) of the Act requires that an injury, to be compensable under the Act, must take place on navigable waters which includes "any adjoining area used by an employer in . . . repairing or building a vessel." 33 U.S.C. §903(a). The record indicates coverage in that claimant was obviously working in an area that played an integral part in the building and repairing of vessels. *Nulty v. Halter Marine Fabricators, Inc., supra*. Employer, however, contends that the fabrication shop was not in an adjoining area. An adjoining area as defined in the Act must be deemed bounded only by the limits of its use as a maritime enterprise. The entire facility at which Morgan worked was designed and used for ship construction and repair. Therefore, the jurisdictional requirements of Section 3(a) of the Act are satisfied. *Maxin v. Dravo Corp., supra; Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRB No. 74-200 (Jan. 31, 1975); *Skipper v. Jacksonville Shipyards, Inc., supra*.

Employer also asserts that if jurisdiction is found to lie, the amendments extending jurisdiction to the activities in "adjoining areas" are unconstitutional. The Board in *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974), stated that it was clear that there was Congressional authority for the extension of jurisdiction in the longshoring and shipbuilding industries both via its maritime jurisdiction and its power to regulate commerce. There is no reason to reiterate that discussion here.

Further, employer objects to the participation in this case of the Director, Office of Workers' Compensation Programs. Administration of the benefits program under the Act is the responsibility of the Director, Office of Workers' Compensation Programs, 20 C.F.R. §§701.201, 701.202. The Solicitor of Labor or his designee is authorized to appear and participate in any formal hearing held pursuant to the regulations implementing the Act on behalf of the Director, as a party-in-interest. 20 C.F.R. §702.333(b). In that the question of the scope of jurisdiction under the Act is a substantial legal issue that affects the administration of the Act, the Director's participation in this case is proper. *See Arnold v. Mast*, 1 BRBS 246, BRB No. 74-148 (Dec. 20, 1974).

The claimant's attorney has requested approval of a fee for services rendered in successful defense of this appeal. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20 C.F.R. §§702.132, 802.203, the

claimant's attorney is awarded a fee of $1325.00 to be paid directly by the employer in a lump sum. 33 U.S.C. §928.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

Dated this 19th day
of March, 1976.

APPENDIX "C"

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

IN THE MATTER OF

ERNEST W. MORGAN (Dec'd) BY
DOROTHY T. MORGAN (Widow) AND
ERNEST W. MORGAN, JR. AND
TIMOTHY E. MORGAN (Minor Children)
Claimants,

versus

Case No. 75-LHCA-129
(Formerly 6-18963)

INGALLS SHIPBUILDING CORP.
DIVISION OF LITTON SYSTEMS, INC.
Self-Insured Employer
Respondent.

Bobby G. O'Barr, Esq.
Hurlbert & O'Barr
P. O. Box 541
Biloxi, Mississippi 39533
For the Claimants

Elden L. Bolton, Jr., Esq.
White & Morse
P. O. Drawer 100
Gulfport, Mississippi 39501
and
David T. Dana, III, Esq.
Litton Industries
360 North Crescent Drive
Beverly Hills, California 90210
For the Respondent

Karen Gilbert, Esq.
(William J. Kilberg, Solicitor of Labor
Marshall H. Harris, Associate Solicitor of Labor)
For the Director, Office of Workers' Compensation Programs United States Department of Labor
Party in Interest

Before: THOMAS F. HOWDER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter "Act") and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

The parties waived their right to a formal hearing, and submitted the case by way of stipulation. This has been duly considered, along with the briefs filed.

Findings and Conclusions

This is a claim by the widow and minor sons of Ernest W. Morgan, who, on June 22, 1973, was fatally injured in the course of his employment at the Fabrication Shop of respondent's shipyard in Pascagoula, Mississippi. The dependents of Mr. Morgan are receiving benefits under state workmen's compensation law, and the sole question is whether the federal statute is applicable.

In contending that the unfortunate accident is not covered by the Act, respondent has raised the following points:

1. Whether respondent is an employer within the meaning of the Act.

2. Whether the decedent was an employee within the meaning of the Act.

3. Whether the location of the accident falls within the coverage of the Act.

4. Whether, if the claim is compensable under the Act, Congress has exceeded its constitutional authority in enacting such legislation.

While respondent's contentions, as propounded by counsel in a thoughtful brief, are deserving of con-

sideration, this case is controlled at the administrative judge level by precedents established by the Benefits Review Board.

I refer to the following BRB decisions: *Gilmore* v. *Weyerhaeuser Co.*, BRB No. 74-141 (Nov. 12, 1974); *Avvento* v. *Hellenic Lines*, BRB No. 74-153 (Nov. 12, 1974); *Adkins* v. *I.T.O. Corp.*, BRB 74-123 (Nov. 29, 1974); *Coppolino* v. *International Terminal Operating Co.*, BRB No. 74-136 (Dec. 2, 1974); *Brown* v. *Maritime Terminals*, BRB Nos. 74-177 and 177A (December 6, 1974); *Herron* v. *Brady-Hamilton Stevedore Co.*, BRB No. 74-171 (Jan. 23, 1975); *Perdue* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-200 (Jan. 31, 1975); *Harris* v. *Maritime Terminals, Inc.*, BRB No. 74-178 (Feb. 3, 1975); *Mason* v. *Old Dominion Stevedoring Corp.*, BRB Nos. 74-182 and 74-182A (Mar. 21, 1975); *Ford* v. *P. C. Pfeiffer Co.*, BRB Nos. 74-191 and 74-191A (March 21, 1975); *Di Somma* v. *John W. McGrath Corp.*, BRB No. 74-199 (Apr. 30, 1975); *Mininni* v. *Pittston Stevedoring Corp.*, BRB No. 74-195 (May 1, 1975); and *Nulty* v. *Halter Marine Fabricators, Inc.*, BRB No. 74-179 (May 2, 1975).

The last case cited, *Nulty*, is especially appropriate in resolving the instant matter. There a carpenter sustained injury while working in a carpentry shop in a shipyard fabricating a block to hold a spare wheel for an off-shore supply vessel. The Board held that the injury was compensable under the Act. Here, claimant's duties in the Fabrication Shop included laying out, cutting, shaping and welding steel parts to be used in the shipyard for the building and repairing of ships. The rationale of *Nulty* mandates a finding of

coverage here from the standpoint of both employment status and geographical situs.[1]

The *Nulty* decision is likewise dispositive of the constitutionality issue raised by respondent. See *Coppolino, supra*, BRB No. 74-136, at pp. 6-7.

On the basis of the foregoing findings and conclusions, I issue the following:

ORDER

1. Respondent is liable for and shall pay, pursuant to Section 9(a) of the Act, reasonable funeral expenses of Mr. Morgan, not exceeding $1000.

2. Respondent is liable for and shall pay to Mr. Morgan's widow and two minor sons, pursuant to Section 9(b) of the Act, 66-2/3% of Mr. Morgan's average weekly wages, until otherwise ordered.

3. Interest on accrued payments shall be paid by respondent at the rate of 6% per annum, computed from the date each payment was originally due.

4. A fee for legal services rendered to claimants will be approved in favor of Bobby G. O'Barr, Esq., upon the filing of an application for such fee.

/s/ THOMAS F. HOWDER
THOMAS F. HOWDER
Administrative Law Judge

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1 While the employer in *Nulty* admitted being an "employer" within the meaning of the Act, the Board's rationale and the clear language of Section 2(4) — especially its reference to shipbuilding and ship repairing — require a finding in this case that respondent is also such an "employer."

Dated: May 19, 1975
Washington, D. C.

I certify that on May 23, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mrs. Dorothy Morgan, Route 1, Box 157, Satsuma, Alabama 36572 — Claimant
Mr. Bobby G. O'Barr, Attorney at Law, Hurlbert and O'Barr, Post Office Box 541, Biloxi, Mississippi 39533
Ingalls Shipbuilding, Post Office Box 149, Pascagoula, Mississippi 39567 ATTN: Mr. Ray Hust
Insurance Carrier or Employer (if self-insured)
Mr. Eldon L. Bolton, Jr., Attorney at Law, White and Morse, Post Office Drawer 100, Gulfport, Mississippi 39501
Mr. David T. Dana, III, Attorney at Law, Litton Industries, 360 North Crescent Drive, Beverly Hills, California 90210

A copy was also mailed by regular mail to the following:

Judge T. Howder, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg. Wash. D.C. 20210

Director, Office of Workmen's Compensation Programs, (LS/HW) U. S. Department of Labor, Washington, D.C. 20211

/s/ R. H. (ILLEGIBLE)
Deputy Commissioner
Sixth Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workmen's Compensation Programs

APPENDIX "D"

United States Court of Appeals
For the Fifth Circuit

October Term, 1976

No. 76-1880

(Your docket No. BRB 75-159)

INGALLS SHIPBUILDING CORPORATION, DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST W. MORGAN, JR., TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTORS, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board (Mississippi Case)

JUDGMENT

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

This cause came on to be heard on the petition of Ingalls Shipbuilding Corporation for review of an order of the Benefits Review Board, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits Review Board in this cause be, and the same is hereby, affirmed.

It is further ordered that petitioner pay to claimants-respondents and respondents, the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1977

Issued as Mandate: MAY 12 1977

APPENDIX "E"

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT
33 USC § 901 et seq.
(As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972)

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

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* District Judge of the Southern District of Florida, sitting by designation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Sec. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."[1] [2]

DEFINITIONS

Sec. 1. When used in this Act —

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

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1 Includes 1972 amendments made by P.L. 92-576 printed in italic.

2 The amendments (except section 19(d) of the Act) are effective thirty days after enactment (12:01 a.m., November 26, 1972).

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the

reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. *"Child," "grandchild," "brother" and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over is, (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.*

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) *The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.*

(17) The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is —

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is

prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.